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No. 10-772

IN THE

Supreme Court of the United States

CITY OF HAZLETON,

Petitioner,

v.

PEDRO LOZANO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The City of Hazleton, Pennsylvania has adopted two ordinances – the Rental Regulation Ordinance (RO) and the Illegal Immigration Relief Act Ordinance (IIRAO) – that, *inter alia*, regulate the leasing and occupancy of residential housing units within the City, in an effort to prevent their occupancy by illegal immigrants. *Amici* address the following issue only:

Whether the housing provisions of the RO and/or the IIRAO are impliedly preempted by federal law, either because they seek to regulate a field that is fully occupied by federal immigration law or because they conflict with federal immigration law.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF has appeared in courts across the country to ensure that governments at all levels possess the resources to combat illegal immigration and to prevent aliens from seeking to vote illegally. *See, e.g., Crawford v. Marion County Bd. of Elections*, 553 U.S. 181 (2008); *Gray v. City of Valley Park*, 567 F.3d 976 (8th Cir. 2009); *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005). WLF also filed a brief in this matter when it was before the appeals court.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

At issue in this case are Hazleton, Pennsylvania ordinances that address two issues: employment of illegal aliens and the leasing of housing to illegal aliens. WLF and AEF support the efforts of Petitioner, the City

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties consent to the filing.

of Hazleton, to obtain the Court's review of both the employment and housing aspects of its ordinances. We recognize, however, that the Court is already reviewing a case that raises preemption issues virtually identical to those raised by the employment aspects of the ordinances, and thus that the Court may choose simply to hold Hazleton's petition pending a decision in that case. *See Chamber of Commerce of the United States v. Whiting*, No. 09-115, *cert. granted*, 130 S. Ct. 3498 (2010).

WLF and AEF nonetheless urge the Court to grant review in this case in order to consider the housing aspects of the Hazleton ordinances. The Court's decision in *Whiting* is unlikely to address issues relating to the constitutionality of Hazleton's efforts to regulate the leasing of housing to illegal aliens. Throughout the past five years, numerous local governments have adopted similar housing ordinances. Those governments have been watching this case closely to discover whether housing ordinances of this type are preempted by federal law. Unless the Court grants review, they will be denied the definitive guidance they have been seeking.

Hazleton's is not the only housing ordinance that has been challenged in court. But none of the other challenges has progressed nearly as far as has this case. If the Court declines to review the housing aspects of the Hazleton ordinances, it is unclear when (if ever) another case raising similar issues would reach the Court. Thus, denial of review would leave numerous local governments across the country without the judicial guidance they so desperately need. WLF and

AEF are filing their brief in order to alert the Court to this situation.

Amici are concerned that the decision below interferes to an unwarranted degree with the authority of state and local governments to exercise their traditional police powers – including the regulation of employment and housing within their jurisdictions. Although *amici* fully support all aspects of Hazleton's certiorari petition, their brief focuses exclusively on preemption issues raised by Hazleton's efforts to regulate rental housing.

STATEMENT OF THE CASE

Amici briefly summarize the facts of the case as they relate to regulation of rental housing within the City of Hazleton.

Both of the ordinances at issue in the petition include provisions that regulate rental housing. The Rental Registration Ordinance ("RO"), Ordinance 2006-13, prohibits occupancy of a rental unit within Hazleton unless the owner has obtained a license from the City. RO §§ 6, 7.a. It further requires all adult occupants of such rental units to obtain an "occupancy permit" at the time they move into the unit. RO § 7.b. In order to obtain an occupancy permit, occupants must provide certain information to the City, including "proper identification showing proof of legal citizenship and/or residency." RO § 7.b.1(g).

Section 5 of the Illegal Immigration Relief Act Ordinance ("IIRAO"), most recently amended by

Ordinance 2007-7, also addresses housing issues. Section 5 imposes burdens on landlords only, not tenants. It prohibits a landlord from renting a dwelling unit in Hazleton to an illegal alien, "knowing or in reckless disregard of the fact that [the] alien has come to, entered, or remains in the United States in violation of law." IIRAO § 5.A.[2] If the City receives a "valid" complaint alleging a violation of IIRAO § 5.A, it is directed to obtain "identity data" from the landlord and forward it to the federal government for verification. IIRAO § 5.B(3).[3] If after completing the verification process, the City determines that the landlord has violated § 5.A – a determination that requires *both* a finding that the tenant is an illegal alien *and* a finding that the landlord has acted knowingly or recklessly – and the landlord fails to correct the violation within the allotted time period, the City is entitled to suspend the landlord's rental license until he/she takes steps to correct the violation. IIRAO § 5.B(4) & (6).

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[2] The prohibition is prospective only; it does not apply to leases in existence at the time that "any judicial injunction prohibiting [the IIRA's] implementation is removed," IIRA § 7.A, an event that has not yet occurred.

[3] The IIRA does not specify how Hazleton is to undertake such verification. Nonetheless, City officials have made clear that they intend to utilize the SAVE ("Systematic Alien Verification for Entitlements") Program, a federal program that allows State and local governments to verify electronically whether an alien is lawfully present in the United States. The SAVE Program is an essential component of numerous federal programs administered by State and local governments; for example, it provides them with a means of determining whether applicants for public benefits qualify for such benefits.

Respondents have mounted a facial challenge to the RO and the IIRAO. The Second Amended Complaint filed in January 2007 listed six plaintiffs who remained parties throughout proceedings in the Third Circuit; all six asserted that they were adversely affected by the housing provisions of the RO and the IIRAO. Respondents include one individual who owns rental property (Pedro Lozano), four individuals who live in rental units in Hazleton (John Does 1, 3, and 7 and Jane Doe 5), and one organization whose members include landlords (Hazleton Hispanic Business Association). The Second Amended Complaint raised a variety of claims under state and federal law, but the only claim on which the Third Circuit ruled in Respondents' favor (and the only claim addressed by the petition) is their claim that the employment and housing provisions of the RO and the IIRAO are preempted by federal immigration law.

Following an 11-day hearing in March 2007, the district court entered final judgment for Respondents and permanently enjoined Hazleton from enforcing the IIRAO and the RO. Pet. App., App.159-App.336. It determined that all of the housing provisions of the two ordinances conflicted with federal immigration law and thus, based on application of implied conflict principles, were preempted by federal law. *Id.* at App.270-App.279.

The district court stated that even when the federal government determines (through its SAVE Program) that an alien is not lawfully present in the United States, the federal government has not necessarily determined that the alien should be required to leave the country. *Id.* at App.273-App.275. It stated

that the federal government may ultimately decide to grant such aliens permanent resident status, or may decide to temporarily stay removal proceedings. *Id.* The district court held that the housing provisions of the RO and IIRAO, by attempting to prevent such aliens from renting housing in Hazleton, conflicts with the federal determination that some such aliens may be permitted to stay in this country. *Id.* The court held that the housing provisions also conflict with federal immigration law because they requires City officials to determine whether individuals are properly in the country, a function (according to the district court) assigned exclusively under federal law to federal immigration judges. *Id.* at App.279.[4]

The Third Circuit affirmed, based on its conclusion that the housing provisions were expressly preempted by the U.S. Constitution and impliedly preempted by federal immigration law. *Id.* at App.109-App.122. It held that Hazleton was not entitled to a presumption against preemption of the housing provisions. *Id.* at App.111. While conceding that the regulation of rental housing is an area in which local governments traditionally exercise their police powers, the Third Circuit held that the ordinances were not really housing regulations at all but rather an attempt to "regulate who may live in Hazleton based on

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[4] The district court also addressed each of Respondent's other bases for challenging the ordinances' housing provisions. The court held that the IIRAO and the RO violated Respondents' federal procedural due process rights, *id.* at App.279-App.293, but it denied most of the other claims. None of those claims was addressed by the Third Circuit, and thus none is encompassed within the petition.

immigration status." *Id.* at App.110. Equating an attempt to regulate who may live in Hazleton with an attempt to regulate who may live in the United States, the court determined that the ordinances were not entitled to a presumption against preemption because "[d]eciding which aliens may live in the United States has always been the prerogative of the federal government." *Id.* at App.111.

The appeals court concluded that the remainder of its preemption analysis "flowed directly" from its conclusion that the Hazleton ordinances' housing provisions "regulate which aliens may live there." *Id.* The court held that such regulation constitute an effort to "regulate immigration" and thus is expressly preempted by the U.S. Constitution, which delegates such power exclusively to the federal government. *Id.* (citing *De Canas v. Bica*, 424 U.S. 351, 355 (1976)). The court also concluded that the housing provisions are impliedly preempted by federal immigration statutes. *Id.* at App.112-App.121. The court held that those statutes occupy the "field" of the continued residence within the U.S. of aliens already within the country, and thus that efforts by state or local governments to "regulate residence in this country based on immigration status" is "field-preempted." *Id.* at App.112.

Finally, the appeals court held that the ordinances' housing provisions were impliedly preempted because they conflict with provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* *Id.* at App.114-App.121. The court stated:

> Under federal law, an unlawful immigration status does not lead instantly, or inevitably, to removal. Under most circumstances, a federal removal hearing under section 240 of the INA is required. Absent certain limited exceptions, this proceeding is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."

Id. at App.115 (quoting 8 U.S.C. § 1229a(a)(3)). The appeals court concluded that the Hazleton ordinances, by attempting to exclude illegal aliens from living within the City, conflicted with federal immigration policy because there was no assurance that the federal government would ever order that those illegal aliens be removed from the United States. *Id.* at App.116. As an example of such conflict, the court stated that "Hazleton would effectively remove from its City an alien college student the federal government has purposely declined to initiate removal proceedings against." *Id.*[5] The

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[5] The appeals court recognized that Respondents had presented a facial challenge to the IIRAO and the RO. *Id.* at App.69 n.25. It nonetheless did not consider whether the Hazleton ordinances might be unconstitutional *as applied* to the hypothetical college student but might nonetheless *not* be preempted when applied to illegal aliens (such as John Does 3 and 7 and Jane Doe 5) who make no claim that the federal government has affirmatively decided not to seek their removal. Indeed, the court said that it was "not at all clear" that the rule normally applicable to facial challenges – that a plaintiff can succeed on a facial challenge only by establishing that "the law is unconstitutional in all its applications," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) – was applicable here in

court rejected Hazleton's argument that 8 U.S.C. §1324(a)(1)(A)(iii), the federal statute that prohibits attempts to "conceal, harbor, or shield" illegal aliens from detection, demonstrates that the ordinances do not conflict with federal law. *Id.* at App.117-App.118. It stated, "The federal prohibition against harboring has never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship." *Id.* at App.118.

REASONS FOR GRANTING THE PETITION

The petition raises issues of great importance to state and local governments throughout the United States. Most studies have estimated that at least 11 million aliens living in United States are not lawfully present (a category of aliens referred to herein as "illegal immigrants"). The vast size of the undocumented alien population has led to calls from across the political spectrum for legislation to address the immigration issue – not only by Congress but also by state and local governments. State and local governments have responded to that call by adopting hundreds of statutes and ordinances. Some of that legislation has sought to assist illegal aliens in their efforts to assimilate into American society, but most has been designed to assist the federal government's efforts to enforce federal immigration law. Laws of the latter type have been adopted due in large measure to congressional statutes that encourage such assistance.

Housing ordinances of the sort at issue here have

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light of the unique circumstances of this case. *Id.*

been adopted by communities across the country. The constitutionality of such ordinances has been called into question by the Third Circuit's decision in this case. Review is warranted to provide guidance to those communities – as well as to the numerous other communities that are considering adopting similar ordinances – regarding whether such housing ordinances are preempted by federal immigration law. Review is particularly warranted because there is little likelihood that another case raising similar issues will reach the court in the foreseeable future. Denial of review would leave the numerous similarly situated local governments, many of which have been looking to this case for definitive resolution of the preemption issue, without the guidance they so desperately need.

Review is also warranted because the decision below conflicts with *De Canas* and others of the Court's preemption decisions. *De Canas* made clear that state and local governments are generally free to adopt legislation designed to address issues raised by the presence of large numbers of illegal aliens, so long as the legislation does not amount to a "regulation of immigration" – that is, a determination of whether an alien should be permitted to remain in the country. 424 U.S. at 355. The Hazleton ordinances do not permit City officials to determine whether aliens should be permitted to remain in the United States. Rather, only after the federal government has informed Hazleton officials that an individual is an illegal alien do the IIRAO and the RO authorize City officials to initiate steps to deny rental housing to the individual. Moreover, *De Canas* makes clear that preventing illegal aliens from renting residential housing in Hazleton does

not constitute the regulation of immigration; denying rental housing in a single city to an alien is hardly the equivalent of forcing the alien to leave the country. While the IIRAO and the RO would be preempted if Congress h[illegible]adopted legislation mandating a different approach t[illegible]ousing policy for illegal aliens, the appeals court identified no such legislation. Review is warranted to resolve the conflict between the decision below and *De Canas*.

I. THE DECISION BELOW CONFLICTS WITH *DE CANAS* BY FINDING PREEMPTION DESPITE THE ABSENCE OF FEDERAL LEGISLATION GOVERNING HOUSING FOR ILLEGAL ALIENS

In determining whether a federal law preempts a challenged state law, the Court has established two guiding principles. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, in the absence of evidence that the federal government intended to displace State law, there can be no preemption.

Second, courts "have long presumed" that the federal government "does not cavalierly pre-empt" state law because of its recognition that "the States are independent sovereigns in our federal system." *Id.* at 485. This presumption against preemption is particularly strong when States are acting to "protect the health and safety of their citizens," because "the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives,

health, comfort, and quiet of all persons." *Id.* at 475. "In *all* pre-emption cases," a court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was *the clear and manifest purpose* of Congress." *Id.* at 485 (emphasis added); *Wyeth v. Levine,* 129 S. Ct. 1187, 1194-95 (2009). The Court has held explicitly that the presumption against preemption applies even when the state law at issue touches upon immigration matters. *De Canas*, 424 U.S. at 355.

In striking down the IIRAO and the RO, the Third Circuit largely ignored the first guiding principle and expressly disavowed the second. Despite acknowledging that the leasing and occupancy of residential rental housing has long been a central focus of the police powers of state and local governments, the appeals court held that the presumption against preemption was inapplicable here because the IIRAO and the RO were not housing regulations of the traditional sort (*e.g.*, regulations designed "to ensure the health and safety" of tenants). Pet. App., at App.111. Rather, they were designed to exclude a class of individuals (illegal aliens) from renting housing within Hazleton. *Id.* The court cited no appellate case law in support of its position, a position that directly conflicts with *De Canas*'s holding that the presumption against preemption applies even when a state or local government is using its police powers for the express purpose of discriminating against illegal aliens and thereby preserving limited resources (whether jobs or rental housing) for citizens and resident aliens. 424

U.S. at 355.[6]

A. Congress Has Adopted No Law Directly Addressing the Provision of Rental Housing to Illegal Aliens

De Canas rejected claims that federal immigration statutes categorically preempted state or local regulation of illegal aliens. *Id.* at 358 (nothing "in either the wording or the legislative history of the INA" reveals "that Congress intended to preclude even harmonious state regulation touching on aliens in general"). Ten years after *De Canas* was decided, Congress adopted the Immigration Reform and Control Act of 1986 ("IRCA") for the purpose of preventing the employment of illegal aliens and thereby reducing the incentive for illegal entry into the country. IRCA quite clearly intended to impose *some* limits on local regulation touching on the employment of illegal aliens, *see, e.g.*, 8 U.S.C. § 1324a(h)(2), and thus *De Canas* has to some degree been superseded in the employment arena. But the Third Circuit's reliance on IRCA serves to highlight the sharp contrast between employment and housing issues: in the 35 years since *De Canas*, Congress has not adopted *any* legislation attempting to regulate housing for illegal aliens. Accordingly, *De Canas*'s rejection of assertions that Congress intended

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[6] A litigant may, of course, be able to overcome the presumption against preemption by demonstrating that the purpose and effect of a specific exercise of traditional police powers conflicts with federal policy. But nothing in the Court's case law supports jettisoning the presumption entirely simply because a state or local government is exercising its traditional police powers for an allegedly untraditional purpose.

broad preemption of state and local laws touching on immigration remains good law in the housing area, and conflicts sharply with the Third Circuit's holding that Congress has preempted state and local government regulation of the provision of rental housing to illegal aliens.

In recent years, Congress has adopted legislation requiring States to adopt practices designed to reduce the incentives for illegal aliens to remain in the country. *See, e.g.*, 8 U.S.C. §§ 1611, 1621 (prohibiting States – with very few exceptions – from paying public benefits to illegal aliens, regardless whether funding for the benefits derives from federal or state sources). It also adopted numerous statutory provisions encouraging state and local governments (and their employees) to cooperate with federal authorities in enforcing the immigration laws. *See, e.g.*, 8 U.S.C. §§ 1103(a), 1252c, 1357(g), 1373(a)-(c), & 1644; 42 U.S.C. § 611a (requiring a State receiving certain federal grants to report to ICE *at least* four times annually the names and addresses of those known to the State to be unlawfully in the United States). It defies logic to suggest that Congress demands that States ferret out illegal aliens to ensure that they are not receiving welfare benefits and actively solicits their cooperation in enforcing immigration laws, yet simultaneously prohibits them from taking steps to prevent illegal aliens from seeking rental housing. Certainly, nothing in any statutory language provides "clear and manifest" evidence that that was Congress's intent.

B. *De Canas* Contradicts the Third Circuit's Holding That Regulation of Housing Amounts to a Prohibited Regulation of Immigration

The Third Circuit conceded that "a state certainly can, and presumably should, regulate rental accommodations to ensure the health and safety of its residents, and that such regulation may permissibly affect the rights of persons in this country unlawfully." Pet. App., at App.111. But the court contended that the "reality" of the Hazleton ordinances was that they were not traditional housing regulations but rather were an impermissible effort to regulate immigration by regulating residence in Hazleton (and, by extension) residence in the United States "based on immigration status." *Id.* at App.112. The court deemed the ordinances to be a *de facto* regulation of immigration, asserting that it is "difficult to conceive of a more effective method of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it." *Id.* at App.112 - App.113.

The appeals court's conclusion that the IIRAO and the RO constituted a prohibited regulation of immigration directly conflicts with this Court's understanding of that term in *De Canas*. The Court there explained that while the "[p]ower to regulate immigration is unquestionably exclusively a federal power," the phrase "the regulation of immigration" has a narrow meaning – confined to "essentially a determination of who should or should not be admitted into the country." 424 U.S. at 354-55. The Court said that State statutes do not constitute the preempted

"regulation of immigration" merely because they have an indirect impact on immigration, so long as they do not seek to enlist State power to deport aliens living within the State. *Id.*

The appeals court sought to distinguish *De Canas* by asserting that regulation of rental housing is qualitatively different from other restrictions that state and local governments might impose on illegal aliens. The court asserted that depriving illegal aliens of rental housing is tantamount to deporting them because they would find it extremely difficult to remain in the country without access to rental housing.[7]

The effort to distinguish *De Canas* in this manner is unavailing. It may be very difficult for illegal aliens to remain in this country if they are denied access to rental housing, but the same could be said for numerous other restrictions that could be imposed on illegal aliens. For example, denying illegal aliens the ability to obtain employment would make it difficult for them to remain in this country, yet *DeCanas* had no difficulty in concluding that a California statute that prohibited the employment of illegal aliens did not constitute a preempted "regulation of immigration." *Id.* Similarly,

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[7] The court acknowledged that the Hazleton ordinances would not prevent illegal aliens from living in any community in the country besides Hazleton. Pet. App., at App.113. It nonetheless asserted that the option of living elsewhere in the country did not make the ordinances any less a regulation of immigration: "To be meaningful, the federal government's exclusive control over residence in this country must extend to any political subdivision. If Hazleton can regulate as it has here, then so could every other state or locality." *Id.*

prohibiting illegal aliens from driving makes it very difficult for illegal aliens to function in American society, yet courts have routinely rejected constitutional challenges to state laws denying illegal aliens access to driver's licenses. *See, e.g., Cubas v. Martinez*, 8 N.Y.3d 611 (2007). The Hazleton ordinances do not meet this Court's limited definition of a regulation of immigration, and the Third Circuit's effort to expand that definition so as to encompass regulations of the sort at issue here conflict with *De Canas*. Review is warrant to resolve that conflict.

C. Respondents' Conflict Preemption Claims Should Await an As-Applied Challenge

The Third Circuit held that the IIRAO and the RO conflicted with (and thus were impliedly preempted by) federal immigration law because they deny rental housing opportunities to illegal aliens who have not been (and may never be) ordered removed from the country. Pet. App., at App.115.

But because Hazleton does not assert the right to bodily remove illegal aliens from the United States (or even from Hazleton), it is difficult to discern the conflict asserted by the appeals court. The Hazleton ordinances no doubt disadvantage illegal aliens, but so do numerous other measures that federal law explicitly authorizes (and in some cases *requires*) state and local governments to adopt. For example, Congress adopted immigration reform legislation in 1996 that, among other things: (1) declared illegal aliens ineligible to receive non-emergency public benefits for which at least a portion of

the funding comes from the federal government, 8 U.S.C. § 1611; and (2) declared that in most instances States are *prohibited* from providing public benefits to illegal aliens, even if the funding comes solely from the State's own resources. 8 U.S.C. § 1621.[8] A principal goal of the 1996 legislation was "to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). The 1996 legislation – which actively encourages (and in some cases *requires*) state and local governments to take steps designed to discourage aliens from coming to, and remaining in, this country – renders untenable the appeals court's claim that Congress viewed any such efforts as an unwarranted interference with the authority of immigration judges to make admission and removal decisions.

Federal officials may on occasion determine that some aliens who are not lawfully present in this country should nonetheless be allowed to remain and, indeed, should not even be subject to penalties based on their unlawful status.[9] But presumably, any such determi-

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[8] The statutes prohibit providing benefits to aliens that are not "qualified." In general, those not lawfully present in the United States are deemed not "qualified." The federal government established the SAVE Program in part to ensure that state and local governments would have the means to determine whether an alien is not "qualified" and thus ineligible for most public benefits. Providing state and local governments with that capability was particularly important because most federal public welfare programs (*e.g.*, TANF, Food Stamps, Medicaid) are administered at the local level.

[9] We note, for example, that federal law exempts from the ineligible-for-public-benefits provisions (8 U.S.C. §§ 1611 & 1621)

nations will be reflected in the response provided to Hazleton by federal officials under the SAVE program, and thus illegal aliens who are entitled to special protections would not be subject to eviction under §5 of the IIRAO.

If it ever happened that an illegal alien determined by federal officials to be entitled to special protection were nonetheless subjected to sanction under the IIRAO and the RO, then that individual could bring an as-applied preemption challenge to those ordinances. But none of the Respondents who have acknowledged that they are illegal immigrants (John Does 3 and 7 and Jane Doe 5) has alleged that he/she has been granted entitlement to such special protections. Respondents thus have no basis for asserting that the IIRAO and the RO are facially unconstitutional because the ordinances may conflict with special protections accorded to *other* illegal immigrants, so long as the ordinances' application to *Respondents* creates no conflict with federal immigration law. Their facial challenge to the ordinances must fail because they have failed to establish that "the law is unconstitutional in all its applications." *Washington State Grange*, 552 U.S. at 449.

Amici note that Hazleton points to the federal anti-harboring statute, 8 U.S.C. § 1324(a)(1)(A)(iii), as evidence that the federal government itself actively discourages the leasing of residential rental units to illegal aliens, and thus that the Hazleton ordinances

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any illegal alien who has applied for protection as a battered spouse or child. 8 U.S.C. § 1641(c).

cannot be deemed to conflict with federal law. The Third Circuit disagreed, stating, "The federal prohibition against harboring has never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship." *Id.* at App.118. *Amici* note that several other appeals courts read § 1324(a)(1)(A)(iii)far more broadly than does the Third Circuit; *amici* find the interpretation of the other appeals courts to be more persuasive. But even if the Third Circuit's interpretation § 1324(a)(1)(A)(iii) were the correct one, Respondents still could not prevail because they have failed to identify a federal immigration policy with which the IIRAO and the RO invariably conflict. Review is warranted to resolve the conflict with the Third Circuit's facial invalidation of the Hazleton ordinances and this Court's admonition that a plaintiff can succeed on a facial challenge only by establishing that the law is unconstitutional in all its applications.

II. REVIEW IS WARRANTED BECAUSE LOCAL GOVERNMENTS NEED GUIDANCE REGARDING LAWS DESIGNED TO REGULATE THE LEASING OF HOUSING TO ILLEGAL ALIENS

The Third Circuit is the only federal appeals court to have addressed whether state and local laws that regulate the leasing of residential housing units to illegal aliens are preempted by federal law. Accordingly, there is no inter-circuit split on the issue. Review by this Court is nonetheless warranted in light of the urgent need for guidance on the issue by local governments across the country. Although similar laws

have been adopted by many other local governments, it is unclear when, if ever, another case raising similar issues will reach the Court. Moreover, this case is a good vehicle for resolving the issue: the case involves a final judgment entered following a trial on the merits, and no procedural issues are likely to prevent the Court from reaching the merits of Respondents' preemption claims.

As both the Petition and the Third Circuit have documented, state and local governments have adopted hundreds of laws in the past five years designed to reduce fiscal and criminal burdens those governments perceive as having been imposed by an influx of illegal aliens. Pet. at 7; Pet. App. at App. 66. The Third Circuit acknowledged that "a number of these laws contain provisions that are either identical, or similar, to provisions in Hazleton's ordinances." *Id.*

A recent law review article sought to identify local housing ordinances of this sort adopted by local governments during a three-year period from 2005 to 2008. The authors identified 13 such housing ordinances. Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485, 504 (2010). That total apparently does not include housing ordinances (such as Hazleton's) "that are the subject of litigation or that have been revoked." *Id.* at 492 n.21. Other jurisdictions have adopted similar housing ordinances in the years since 2008 or are considering doing so. *See, e.g., Keller v. City of Fremont*, No. 8:10CV270 (D. Neb.) (recently filed challenge to housing ordinance adopted in 2010 by Fremont, Nebraska).

Accordingly, a wide range of local governments have a strong interest in receiving guidance from the Court regarding whether housing ordinances such as Hazleton's are preempted by federal immigration law.

Yet, primarily because of the high costs of litigation, few local governments have been willing to follow Hazleton's path and defend their ordinances if sued by the American Civil Liberties Union. For example, after the ACLU in November 2006 filed a federal preemption challenge to the City of Escondido, California's housing ordinance and obtained a temporary restraining order, Escondido responded almost immediately by entering into a stipulated judgment whereby it was permanently enjoined from enforcing the ordinance. *Garrett v. City of Escondido*, No. 06-cv-2434 (S.D.Cal., Dec. 15, 2006) (Doc. No. 25).[10] Similarly, Valley Park, Missouri and Riverside, New Jersey repealed virtually identical housing ordinances after the ACLU filed suit against them.[11] *Riverside Coalition of Business Persons v. Township of Riverside*, No. 06-cv-05521 (D.N.J. 2006). News accounts indicate

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[10] The stipulation enables Escondido to re-adopt its ordinance should a higher court later determine that such housing ordinances are not preempted. *Id.* at Para. 3 ("This stipulated judgment is not an admission or finding of liability and shall not constitute a final determination on the merits of any issue.").

[11] Although Valley Park rescinded its housing ordinance, it decided to keep its ordinance that was designed to prevent the employment of illegal aliens. The federal courts ultimately upheld that employment ordinance, rejecting the ACLU's claim that it was preempted by federal immigration law. *Gray v. City of Valley Park*, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo., Jan. 31, 2008), *aff'd*, 567 F.3d 976 (8th Cir. 2009).

that Riverside decided to repeal its ordinance in advance of any judicial ruling in large measure to avoid the high costs of litigation. *See* Ken Belson, "Towns Rethink Laws Against Illegal Immigrants," *New York Times* (Sept. 26, 2007).

In sum, although housing ordinances similar to Hazleton's have been adopted throughout the country, most legal challenges to those ordinances have not proceeded past the preliminary stage because most towns are unwilling to emulate Hazleton's commitment to spending large amounts of money in defense of their ordinances. Instead, other local governments have largely looked to this case for guidance on whether their laws are preempted. Indeed, Cherokee County, Georgia's official response to an ACLU challenge to its housing ordinance has been to look to this case for guidance. *See Robert Stewart, Inc. v. Cherokee County, Georgia*, No. 07-cv-0015 (N.D. Ga., Jan. 4, 2007) (consent order to preliminary injunction). The consent order explicitly stated: (1) "Cherokee County is amenable to avoiding any further expense for all parties associated with pursuing injunctive relief and is willing to consent to this Motion without making any admissions as to the validity of the Plaintiffs' claims"; and (2) "all proceedings in this case are stayed" pending resolution of the litigation challenging the Hazleton housing ordinances. *Id.* Unless the Court grants review, the *Robert Stewart* parties will never receive the definitive guidance they have been waiting four years to receive.

In sum, review is warranted in this case to provide the many local jurisdictions that have adopted

(or are contemplated adopting) housing ordinances similar to Hazleton's with the guidance they so desperately need, guidance that the Court is unlikely to be in a position to provide in connection with any other case in the foreseeable future.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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